

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-070864
	:	TRIAL NO. B-0703612-A
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
JARRED COTTON,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar. This judgment entry is not an opinion of the court.¹

Following a jury trial, defendant-appellant Jarred Cotton appeals his conviction for the aggravated robbery of Aaron Carmichael. Cotton was also found guilty of an accompanying firearm specification and a separate count of robbery. After merging the robbery count with the aggravated-robbery count, the trial court imposed an aggregate sentence of ten years' imprisonment.

As Carmichael returned to his Roselawn home late on a Saturday evening, Cotton, Anthony Cobb, Marcus Harris, and an unknown person approached Carmichael. As the other three remained about 20 feet away, Cotton came up to Carmichael and pointed a silver-colored revolver at him. Carmichael surrendered his cellular phone, cash, and a silver pendant. The four then casually walked away from Carmichael.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

From a nearby grocery store, Carmichael summoned the police and gave a description of Cotton. A nearby three-officer violent-crime unit quickly responded. Officer Mark Longworth spotted Cotton and the unknown person walking through a parking lot. The two fled. While his two fellow officers chased Cotton, Longworth apprehended Cobb and Harris. Cobb was found to have the pendant in his possession. During a search of the path that Cobb and Harris had taken, the officers found the discarded revolver.

The officers brought Cobb and Harris to Carmichael. He identified them as members of the group that had maintained their distance from him during the robbery. Two other individuals were brought before Carmichael for identification. Carmichael did not recognize the first person, believed to be the unknown fourth assailant. But he quickly identified Cotton as the person who had stood face-to-face before him, had pointed the revolver at him, and had taken his property.

In his first assignment of error, Cotton now contends that the trial court erred in overruling his motion to suppress Carmichael's identification testimony. Cotton argues that the one-on-one showup method employed by police to identify him was unduly suggestive.

A two-part test is used to determine whether identification testimony should be suppressed.² First, the defendant must demonstrate that the identification procedure was unnecessarily suggestive.³ Next, the court must determine "whether, under all the circumstances, the identification was reliable, i.e., whether there was 'a very substantial likelihood of irreparable misidentification.'"⁴ In making this determination, a court

² See *State v. Waddy* (1992), 63 Ohio St.3d 424, 438, 588 N.E.2d 819; see, also, *State v. Haynes*, 1st Dist. No. C-020685, 2004-Ohio-762, ¶3.

³ See *id.*

⁴ *State v. Keeling*, 1st Dist. No. C-010610, 2002-Ohio-3299, ¶15, quoting *Simmons v. United States* (1968), 390 U.S. 377, 388, 88 S.Ct. 967.

should consider certain factors, such as the witness's opportunity to view the suspect during the crime, the witness's degree of attention, the accuracy of the witness's prior description of the suspect, the witness's certainty, and the time elapsed between the crime and the identification.⁵ Even if the identification procedure was suggestive, a resulting identification is admissible as long as it is proved to be reliable.⁶

At the suppression hearing, the state established that Carmichael had clearly viewed his four assailants. Carmichael had the opportunity to closely view Cotton's face, clothing, and the handgun that he had carried. Carmichael had been able to provide the police with a description of Cotton and his clothing. Within 20 minutes after the robbery, police had apprehended a suspect matching the description given by Carmichael, and Carmichael had identified Cotton as the perpetrator who had stood face-to-face before him. Carmichael testified that there was no hesitation in his mind that he had properly identified Cotton. And he was certain enough to have told police that the third suspect brought before him for identification was not part of the group of perpetrators. Applying the applicable legal standard to these facts, we find no error in the trial court's decision.

Cotton's next contention, that evidence flowing from the showup identification should have been suppressed because Cotton was illegally seized, is feckless. Cotton resembled the description of the robbery suspect given by Carmichael. And he was apprehended fleeing from the vicinity of the robbery just minutes after the crime. Under the totality of the circumstances, police officers had a reasonable, articulable suspicion that Cotton was engaged in criminal activity sufficient to justify his brief detention while they investigated the situation.⁷ The first assignment of error is overruled.

⁵ See *Neil v. Biggers* (1972), 409 U.S. 188, 93 S.Ct. 375; see, also, *State v. Haynes* at ¶3.

⁶ See *State v. Haynes* at ¶3.

⁷ See *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868.

In his second assignment of error, Cotton asserts that the trial court erred in overruling his motion for a mistrial when, during its case-in-chief, the state asked Officer Longworth whether Cobb and Harris had admitted to robbing Carmichael during questioning at a district police station.

A trial court should declare a mistrial “only when the ends of justice so require and when a fair trial is no longer possible.”⁸ The decision to grant a mistrial rests with the trial court and is reviewed by this court for an abuse of discretion.⁹ An abuse of discretion is not just an error in judgment. It involves an unreasonable, arbitrary, or unconscionable decision by the trial court.¹⁰

Here, Cotton immediately objected to the question. The trial court sustained the objection, and Officer Longworth never provided an answer to the question. Cotton then moved for a mistrial. The trial court was in the best position to determine the impact of the unanswered question on the jury. It chose to continue the trial. But before permitting the jury to begin its deliberations, the trial court instructed the jury that “[y]ou may not speculate as to why I sustained the objection to any question or what the answer to such a question might have been. You must not draw any inference or speculate on the truth of any suggestion included in a question which was not answered.” Nothing in the record leads us to conclude that the trial court abused its discretion. The assignment of error is overruled.

Cotton raises four distinct contentions within his next assignment of error. Each, however, must fail. He first argues that the trial court abused its discretion in refusing to remove a prospective juror for cause when, during voir dire, she stated her belief that a

⁸ *State v. Brewster*, 1st Dist. Nos. C-030024 and C-030025, 2004-Ohio-2993, ¶67, quoting *State v. Broe*, 1st Dist. No. C-020521, 2003-Ohio-3054, ¶36.

⁹ See *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, ¶92.

¹⁰ See *State v. Person*, 174 Ohio App.3d 287, 2007-Ohio-6869, 881 N.E.2d 924, ¶12; see, also, *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597.

defendant might have a duty to exonerate himself at trial. The decision to excuse a juror for cause rests within the trial court's discretion.¹¹ In this case, the trial court questioned the prospective juror, ensured that she understood that Cotton was presumed to be innocent and that the burden rested with the state to prove Cotton's guilt beyond a reasonable doubt, and refused to remove the juror. As this decision was supported by a sound reasoning process, we will not disturb it on appeal.¹²

Cotton next asserts that the prosecution engaged in purposeful discrimination by using a peremptory challenge to dismiss a juror who, like Cotton, was an African-American.¹³ As this court explained in *State v. King*, "a three-step inquiry [is employed] for evaluating whether the state's use of a peremptory challenge is discriminatory. A defendant must first establish a prima facie showing that the state has exercised a peremptory challenge on the basis of race. Then the burden shifts to the state to provide a race-neutral explanation for its challenge. If the state offers a race-neutral explanation, the burden shifts back to the defendant to establish that the reason advanced by the state is pretextual. The court must then determine whether the defendant has proved purposeful racial discrimination."¹⁴

"The race-neutral explanation by the state during a *Batson* challenge does not need to rise to the level justifying a challenge for cause. And a trial court's finding of no discriminatory intent will not be reversed on appeal unless it is clearly erroneous."¹⁵

Here, after the state had used a preemptory challenge to excuse a 25-year-old African-American woman from the venire, Cotton raised a *Batson* challenge. The state

¹¹ See *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 168, 559 N.E.2d 1301.

¹² See *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*

¹³ See *Batson v. Kentucky* (1986), 476 U.S. 79, 89, 106 S.Ct. 1712.

¹⁴ 1st Dist. No. C-060335, 2007-Ohio-4879, ¶26-27, citing *Batson v. Kentucky*, 476 U.S. at 96-98, 106 S.Ct. 1712; *State v. White*, 85 Ohio St.3d 433, 1999-Ohio-281, 709 N.E.2d 140; and *State v. Hernandez* (1992), 63 Ohio St.3d 577, 583, 589 N.E.2d 1310.

¹⁵ *Id.*

first responded that no pattern of discrimination had been established. We have repeatedly held that “[t]he explanation offered by the prosecutor—that [the defendant] ha[s] not established a pattern of discriminatory exclusion based on race * * * is not a facially valid race-neutral justification for a peremptory strike.”¹⁶

But the state also explained that it had struck the juror because of her young age. The trial court found this to be a valid race-neutral justification.¹⁷ On this record, the trial court’s decision to credit the state’s explanation was not clearly erroneous.

Cotton next challenges the weight and the sufficiency of the evidence adduced at trial to support his aggravated-robbery and firearm-specification convictions. A review of the record fails to persuade us that the jury clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered.¹⁸ As the weight to be given the evidence and the credibility of the witnesses were primarily for the trier of fact to determine, the jury, in resolving conflicts in the testimony, including Carmichael’s identification of Cotton, could properly have found that Cotton had robbed Carmichael while brandishing a handgun.¹⁹

The record also reflects substantial, credible evidence from which the jury could have reasonably concluded that the state had proved all elements of the charged crime and specifications beyond a reasonable doubt.²⁰ The third assignment of error is overruled.

¹⁶ *State v. Walker* (2000), 139 Ohio App.3d 52, 56, 742 N.E.2d 1173.

¹⁷ See, e.g., *State v. Curtis*, 3rd Dist. No. 9-02-11, 2002-Ohio-5409, ¶49.

¹⁸ See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

¹⁹ See *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus; see, also, R.C. 2911.01(A)(1).

²⁰ See *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, at ¶36; see, also, *State v. Waddy* (1991), 63 Ohio St.3d 424, 588 N.E.2d 819, certiorari denied (1992), 506 U.S. 921, 113 S.Ct. 338.

The fourth assignment of error, in which Cotton claims that his trial counsel was ineffective for failing to challenge a prospective juror for cause and for not requesting a limiting instruction concerning the state's question to Officer Longworth, is overruled.

Judicial scrutiny of trial counsel's performance must be highly deferential; this court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance.²¹ And a reviewing court will not ordinarily second-guess strategic decisions made by trial counsel to pursue one course of defense over another.²²

After reviewing the record, including trial counsel's lengthy voir dire examination of the prospective juror, during which she maintained that she could remain fair and impartial,²³ and trial counsel's contemporaneous objection to the questioning of Officer Longworth and immediate motion for a mistrial,²⁴ we hold that there were no acts or omissions by Cotton's trial counsel that deprived him of a substantive or procedural right, or that rendered the trial fundamentally unfair.²⁵

In his final assignment of error, Cotton contends that the cumulative effect of alleged errors deprived him of a fair trial. However, our review of the record shows that any irregularities in the trial did not "become prejudicial by sheer weight of numbers" and thus deprive Cotton of his right to a fair trial.²⁶ The fifth assignment of error is overruled.

Therefore, the trial court's judgment is affirmed.

²¹ See *Strickland v. Washington* (1984), 466 U.S. 668, 689, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373.

²² See *State v. Mason*, 82 Ohio St.3d 144, 157-158, 1998-Ohio-370, 694 N.E.2d 932, certiorari denied (1998), 525 U.S. 1057, 119 S.Ct. 624.

²³ See R.C. 2313.42(J).

²⁴ See *Bowden v. Annenberg*, 1st Dist. No. C-040499, 2005-Ohio-6515, ¶19.

²⁵ See *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838; see, also, *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. 2052; *State v. Bradley* at paragraphs two and three of the syllabus.

²⁶ *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶112, quoting *State v. Hill*, 75 Ohio St.3d 195, 212, 1996-Ohio-222, 661 N.E.2d 1068.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., HENDON and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on March 18, 2009
per order of the Court _____.
Presiding Judge